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No. 92-1372

In The

Supreme Court of the United States

October Term, 1992

DEXTER ELLERBEE,
Petitioner,

v.

DEXTER MILLS,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ATLANTA JOURNAL-CONSTITUTION

Jonathan D. Hart, Esq.
Counsel of Record

Peter C. Canfield, Esq.
Thomas M. Clyde, Esq.
DOW, LOHNES & ALBERTSON
One Ravinia Drive
Suite 1600
Atlanta, GA 30346
(404) 901-8800

Counsel for Amicus Curiae
The Atlanta Journal-Constitution

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MOTION OF THE ATLANTA JOURNAL-CONSTITUTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Atlanta Journal-Constitution hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the

attorney for the petitioner has been obtained and his letter of consent has been filed with the Court. The consent of the attorney for the respondent was requested but refused.

The Atlanta Journal-Constitution publishes The Atlanta Journal and The Atlanta Constitution, newspapers of general circulation in the State of Georgia. The Atlanta Journal-Constitution is wholly owned by Cox Enterprises which publishes newspapers in 13 states.

Although the instant case does not involve a media defendant, the judgment and opinion of the Georgia Supreme Court seriously affects media organizations. The Georgia Supreme Court has held that, for the purpose of a defamation action, a public high

school principal is not a "public official" required to prove actual malice before recovering for defamatory statements concerning his official conduct.

This decision raises the specter of more numerous and increasingly costly defamation claims being brought against media organizations that report on educational issues. Yet, public education is increasingly a matter of public interest and concern. The Atlanta Journal-Constitution and other media organizations regularly report on educational issues and considerable libel litigation has already resulted.

The petitioner in this case is a private citizen with interests that are different in substance and scope than the Atlanta Journal-Constitution. As a

media organization with longstanding experience with the impact of defamation law on news reporting, The Atlanta Journal-Constitution can speak with a voice that cannot be duplicated by the petitioner.

Respectfully submitted,

Jonathan D. Hart, Esq.
Counsel of Record

Peter C. Canfield, Esq.
Thomas M. Clyde, Esq.
DOW, LOHNES & ALBERTSON
One Ravinia Drive
Suite 1600
Atlanta, GA 30346
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Peter C. Canfield, Esq.
Thomas M. Clyde, Esq.
DOW, LOHNES & ALBERTSON
One Ravinia Drive
Suite 1600
Atlanta, GA 30346
(404) 901-8800

Counsel for Amicus Curiae
The Atlanta Journal-Constitution

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BRIEF OF THE ATLANTA JOURNAL-CONSTITUTION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Amicus Curiae The Atlanta Journal-Constitution respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Georgia, entered in the above entitled case on November 16, 1992.

INTEREST OF THE AMICUS CURIAE

The Atlanta Journal-Constitution publishes The Atlanta Journal and The Atlanta Constitution, newspapers of general circulation in the State of Georgia. The Atlanta Journal-Constitution is wholly owned by Cox Enterprises which publishes newspapers in 13 states.

Although the instant case does not involve a media defendant, the judgment and opinion of the Georgia Supreme Court seriously affects media organizations. The decision of the Georgia Supreme Court raises the specter of more numerous and increasingly costly defamation claims being brought against media organizations

that report on educational issues.[1] Yet, public education is increasingly a matter of public interest and concern. Because it regularly reports on educational issues, The Atlanta Journal-Constitution has a substantial interest in the outcome of this case.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE GEORGIA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER THAT CONFLICTS WITH THE PRECEDENT OF THIS COURT PROTECTING WIDE-OPEN DEBATE ON THE OPERATION OF GOVERNMENT.

The Court has long recognized "a profound national commitment to the principle that debate on public issues

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[1] For examples of libel claims against media defendants stemming from news reporting on educational issues, see cases cited, infra, note 9.

should be uninhibited, robust, and wide-open." New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Speech regarding matters of public importance, particularly commentary on the functioning and management of government, is at the very core of the protection afforded by the First Amendment. The decision of the Georgia Supreme Court in the instant case, holding as a matter of law that a public high school principal is not a "public official" for purposes of a defamation claim based on statements critical of his official conduct, is contrary to the commitment of this Court "to assure the unfettered interchange of ideas for bringing about political and social changes." Id. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

In New York Times, the Court observed that if criticism of government is to be protected, the First Amendment must shield speech critical of those in government. The Court held that a "public official" may not recover for false and defamatory statements critical of his or her official conduct absent actual malice. 376 U.S. at 280. The Court in New York Times declined to specify exactly "how far down into the lower ranks of government employees the 'public official' designation would extend." 376 U.S., at 283, n.23. Since New York Times, however, the Court has twice attempted to define the scope of the "public official" designation in a manner that maintains fidelity to the principle that, at its core, the First

Amendment protects speech critical of government.

In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court again recognized that "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized." In an attempt to clarify the issue left unresolved in New York Times -- to whom the designation of "public official" should apply -- the Court held that the designation was merited by a broad range of individuals acting in the service of the government, including those serving in both elected and non-elected positions. Id. at 86. The designation was appropriate both for government employees formulating policy and for government employees implementing policy. Id. Furthermore, the Court

emphasized that the designation was warranted even where a government employee had little actual authority, if the employee enjoyed a public perception to the contrary. Id.

> [T]he "public official" designation applies at the very least to those among the hierarchy of governmental officials who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the New York Times malice standards apply.

Id.

The Court's recognition in Rosenblatt that it is appropriate to base

a "public official" designation on the public's perception of authority is particularly important to journalists. Because of the demanding time constraints involved in news reporting, journalists do not have the luxury to research the actual authority of all newsworthy figures. Decisions have to be made on the authority that an official appears to possess.

In Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974), the Court elaborated on the justifications underlying the designation of "public official" previously explored in Rosenblatt. The Court held that the designation of "public official" is deserved by those who "seek governmental office" because individuals who accept such a position must also "accept certain

necessary consequences of that involvement in public affairs." An official who has accepted a governmental position, the Court reasoned, must likewise accept "the risk of closer public scrutiny than might otherwise be the case." Id.

The judgment and opinion of the Georgia Supreme Court in the instant case is contrary to the decisions of this Court in Gertz and Rosenblatt and incompatible with this Court's commitment to the principle that robust and wide-open debate on the operation of government must be protected.[2] The

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[2] Since Rosenblatt and Gertz, this Court has only revisited the meaning of the "public official" designation in dictum in Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979). Although the plaintiff's designation was not at issue, the Court observed, "The Court has not provided precise boundaries for the category of 'public official'; it

Georgia Supreme Court held as a matter of law that a high school principal is not a "public official" for the purposes of a defamation suit based on statements made about the principal's official conduct. 262 Ga. at 516. The Georgia Supreme Court concluded that "a principal simply does not have the relationship with government to warrant 'public official' status" and that "[p]rincipals, in general, are removed from the general conduct of government, and are not policymakers at the level intended by the New York Times designation of public official." 262 Ga. at 517.

The Georgia Supreme Court reached this conclusion despite substantial evidence in the record demonstrating the

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cannot be thought to include all public employees, however." Id.

broad authority exercised by respondent and the extensive control over public high schools conferred on all principals under Georgia law. At trial, respondent admitted that he supervised the "instructional program," "public relations program," and "extracurricular program" at North Cobb High School -- an obligation so demanding that he required five assistant principals. Petitioner's Appendix at 17. His duties required his active involvement not only in the day-to-day operation of the school, but also his participation in various booster clubs that funded projects at the school. Id. It was respondent's "responsibility" to evaluate each of the teachers at the school and make hiring and firing decision where appropriate. Petitioner's Appendix at 18. Under Georgia law, as

principal, respondent was accountable for all expenditures,[3] exercised control over the school's buildings and grounds,[4] and was authorized to discipline students and exclude access to visitors as he saw fit.[5]

II. THE GEORGIA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS REACHED BY THE HIGHEST COURTS IN SEVERAL STATES AND WITH THE DECISION OF THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

In concluding that a high school principal is not a "public official", the Georgia Supreme Court reached a determination contrary to decisions of the United States Court of Appeals for

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[3] See O.C.G.A. §§ 20-2-960, 20-2-962.

[4] See O.C.G.A, § 20-2-1180.

[5] See O.C.G.A. §§ 20-2-731, 20-2-1180, 20-2-1182.

the Seventh Circuit, the Supreme Courts of Vermont and Mississippi, and the Court of Special Appeals of Maryland.[6] In reaching its decision, the Georgia Supreme Court relied on the reasoning and judgment of an appellate court in Illinois.

In Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988), cert. denied, 489 U.S. 1065 (1989), the principal of a public elementary school brought a defamation suit against ten members of the school's parental advisory board

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[6] The Georgia Supreme Court was apparently not aware of either the decision of the Seventh Circuit or of the Vermont Supreme Court at the time of its ruling. In the first footnote of the opinion, the Court indicated it understood only two courts had designated a school principal to be a "public official" and cited the decision of the Court of Special Appeals of Maryland and the decision of the Supreme Court of Mississippi.

based on nine separate statements criticizing the school's administration. Id. at 396-97. In affirming the trial court's designation of the plaintiff as a "public official," Judge Easterbrook observed for the Court that "Stevens was a public official -- just like the commissioner who supervised the police in New York Times . . . Stevens was not an elected public official, but as principal she possessed great discretion over the operation of Mollison School. How she used that discretion was the subject of legitimate public debate." Id.

In Palmer v. Bennington School District, 615 A.2d 498 (Vt. 1992), the Vermont Supreme Court held that the principal of a public elementary school was a "public official" for purposes of a defamation suit against his former school

district. The action stemmed from statements by the district's board to the effect that the principal had misappropriated funds and falsified employee time records. Id. at 499-500. In concluding that the principal was a public official, the Vermont Supreme Court noted the holding in Rosenblatt that the designation of a "public official" could rest on either actual authority or the appearance of authority. Id. at 502. The Court concluded that the principal "had power and authority within his school . . . and was in fact and appearance the person in charge of the operation of the school." Id. at 503. Also relying on Rosenblatt, the Vermont Supreme Court rejected as "meritless" the principal's argument that the relatively small size of his elementary school made

his "public official" designation inappropriate. Id.

In Reaves v. Foster, 200 So. 2d 453 (Miss. 1967), the Mississippi Supreme Court upheld the reversal of a judgment in favor of the principal of a public school in his defamation suit against members of a "citizens club" critical of his leadership. In the pamphlet distributed by the defendants, the principal had been described as a "traitor to his race, a stooge, a stool pigeon, an informant, and a betrayer of his people." Id. at 454. The Court held that "a man occupying a prominent position public or quasi-public in nature is subject to grave criticism and malice is not presumed, but must be proven." Id. at 456.

In Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251 (1975), the Court of Special Appeals of Maryland reversed a judgment in favor of the principal of a public high school holding that the principal was a "public official" for the purposes of his defamation suit against the Montgomery County Sentinel. The Sentinel had published an article evaluating principals in Montgomery County based on a rating system that drew on both the reporter's observations and evaluations returned by students and teachers. Dunn received an "unsuited" rating and his administration of the school was criticized in detail in the article. Id. at 518, 343 A.2d at 255-56. The Court of Special Appeals held, "[i]t is plain that as a high school principal . . . Dunn was within the 'public figure-

public official' classification and that his suitability for the position was a matter of public or general interest or concern." Id. at 524, 343 A.2d at 258. The court explicitly relied on "the minimal parameters of the public official classification" announced in Rosenblatt. Id. at 524, 343 A.2d at 258 n.10.

In the instant case, the Georgia Supreme Court cited but rejected Kapiloff v. Dunn and Reaves v. Foster, relying instead on the reasoning of McCutcheon v. Moran, 99 Ill. App. 3d 421, 425 N.E.2d 1130 (1981). In McCutcheon, the Appellate Court of Illinois held that the plaintiff, a public school principal and teacher was not a "public official" for purposes of her defamation claim against a school janitor. The janitor had brought criminal charges against her and

testified against her before the board of education, alleging that the principal had kicked him. Id. at 422, 425 N.E.2d at 1131-32. The Appellate Court read New York Times and Illinois precedent as implying a freedom "to those who are influenced by the operation of government to criticize those who control the conduct of government." But the Court of Appeals considered "[t]he relationship a public school teacher or principal has with the conduct of government [to be] far too remote . . . to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation." Id. at 424, 425 N.E.2d at 1133.

The Georgia Supreme Court's refusal to recognize that a public school principal constitutes a "public official"

within the meaning of Sullivan is in conflict with authority from other state courts and with the decision of the United States Court of Appeals for the Seventh Circuit. This Court should issue a writ of certiorari to the Georgia Supreme Court to resolve this conflict.

III. THE EXISTENCE OF CONFLICTS AMONG STATE AND FEDERAL COURTS REGARDING THE DESIGNATION OF A SCHOOL PRINCIPAL AS A "PUBLIC FIGURE" IS CONTRARY TO THE COMMITMENT OF THIS COURT TO PREVENT THE CONSTITUTIONAL PROTECTION OF EXPRESSION FROM "VARYING WITH STATE LINES."

In Rosenblatt, this Court rejected the suggestion that the designation of a "public official" should be determined by reference to state law standards. 383 U.S. at 84. The Court rejected this suggestion not only because existing state law standards, which were enacted for administrative purposes, were

unresponsive to the interests at stake in defamation claims, but also because the variation that would result from this approach would undermine the purposes of the First Amendment.

> Our decision in New York Times . . . draws its force from the constitutional protections afforded free expression. The standards that set the scope of its principles cannot therefore be such that "the constitutional limits of free expression in the nation would vary with state lines."

Id. (quoting from Pennekamp v. State of Florida, 328 U.S. 331, 335 (1946)).

Since Rosenblatt and Gertz, this Court has only revisited the meaning of the "public official" designation on one brief occasion -- in a single reference in dictum in Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979). There the Court observed it had "not provided

precise boundaries for the category of 'public official.'" Id. Because of this absence of "precise boundaries," conflicts have developed among the lower state and federal courts regarding the appropriate designation of a variety of government officials. Conflicts currently exist, for example regarding the designation of police officers,[7]

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[7] Compare, e.g., McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493, cert. denied, 454 U.S. 1017 (1981) (deputy sheriff is not a "public official") with Ammerman v. Hubbard Broadcasting Inc., 91 N.M. 250, 573 P.2d 1258 (App. 1977), cert. denied, 436 U.S.906 (1978) (deputy sheriff is a "public official") and St. Amant v. Thompson, 390 U.S. 727, 730 (1968) (Supreme Court accepted determination of Louisiana Supreme Court that a parish deputy sheriff is a "public official").

undercover informants,[8] and public school teachers.[9]

In the instant case, the Georgia Supreme Court has highlighted the

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[8] Compare Etheridge v. North Mississippi Communications, Inc., 460 F. Supp. 347 (N.D. Miss. 1978) (undercover narcotics agent is "public official") with Jenoff v. Hearst Corp., 644 F.2d 1004, 1006 (4th Cir. 1981) (government informant is not a "public official").

[9] The weight of authority supports the designation of public school teachers as "public officials". Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978); Sewell v. Brookbank, 119 Ariz 422, 581 P.2d 267 (App. 1978); Basarich v. Rodeghero, 24 Ill. App. 3d 889, 321 N.E.2d 7339 (1974). But see Richmond Newspapers v. Lipscomb, 362 S.E.2d 32 (Va. 1987) (public school teacher not a "public official") cert. denied 486 U.S. 1023 (1988); Franklin v. Benevolent & Protective Order of Elks, 97 Cal. App. 3d 315, 159 Cal. Rptr. 131 (1979) (public high school teacher neither "public official" nor "public figure" as a matter of law). The Georgia Supreme Court's decision would move First Amendment law in Georgia down an ironic, and clearly inappropriate, path: teachers may be "public officials" while their employers are not.

variation in the designation of "public officials" that has emerged from the imprecise boundaries set forth in the prior decisions of this Court. Because media organizations increasingly publish news regionally and nationally, publication decisions are often based on the lowest common denominator: the law of the jurisdiction least respectful of modern First Amendment jurisprudence. Inconsistent and unreliable determinations regarding the designation of "public officials" are particularly troubling.

IV. THE SUPREME COURT OF GEORGIA HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER THAT CONFLICTS WITH PRECEDENT OF THIS COURT RECOGNIZING THAT PUBLIC EDUCATION IS A GOVERNMENT FUNCTION OF THE HIGHEST ORDER.

This Court has recognized frequently and eloquently the importance of the public school system in this country. In Ambach v. Norwick, 441 U.S. 68, 75 (1979), the Court observed that,

> The importance of public schools in the preparation of individuals as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions: "Today, education is perhaps the most important function of state and local governments . . ."

Id. at 75 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)). In Ambach, the Court traced the importance

of public schools to the fact that the education provided by these institutions influences "the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy." Id.

In Wisconsin v. Yoder, 406 U.S. 205, 213 (1972), the Court noted that "[p]roviding public school education ranks at the very apex of the function of a State." The Court also observed that the public school system was not isolated from the protections provided by the First Amendment. "[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests such as

those specifically protected by . . . the First Amendment." Id. at 214; See generally Tinker v. DesMoines Independant Community School District, 393 U.S. 503, 506 (1968) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

The decision of the Georgia Supreme Court is inconsistent with the longstanding commitment of this Court to the principle that education is a government function of the highest order. In refusing to recognize a public high school principal as a "public official" the Georgia Supreme Court concluded that "[p]rincipals are removed from the general conduct of government." This decision stands in stark contrast to the

view of this Court that "education is the most important function of the state." Brown at 493. Review of the Georgia Supreme Court's decision is necessary to establish that the "public official" designation is appropriate for the administrators of the nation's school system because the obligation that these officials have accepted places them at the heart of one of the essential functions of our government. The responsibility these officials have accepted is too important to shield them from criticism that may serve to make public schools more responsive to the educational needs of the country.

V. THE ERROR OF THE GEORGIA SUPREME COURT IN REFUSING TO RECOGNIZE A PUBLIC HIGH SCHOOL PRINCIPAL AS A "PUBLIC OFFICIAL" IS NOT HARMLESS.

In his Brief In Opposition, respondent claims that review of this case is not merited because the jury's award of punitive damages was predicated on an instruction requiring proof of actual malice. Respondent claims that even if this Court determines that a public high school principal is a "public official," the error will be harmless for the purposes of this case. The respondent's argument is flawed as matter of fact and law.

The punitive damages instruction given to the jury in this case contained no requirement that actual malice be proven by "clear and convincing"

evidence.[10] As a result the finding made by the jury is a legally insufficient basis upon which to predicate a libel verdict in favor of a "public official." New York Times, 376 U.S. at 285-86.

Moreover, the Court's instruction to the jury directing that petitioner could be found liable for merely negligent misstatements cannot be redeemed by the mention of actual malice in the context of a subsequent damages instruction. See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 568 (1981) ("Because the court simply bypassed the issue of liability and went directly to the issue of damages, we simply do not have the

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[10] The entire punitive damages instruction is printed at Respondent's Brief In Opposition at 16.

benefit of its views as to whether the respondent in fact violated [the law]"); Cupp v. Naughten, 414 U.S. 141, 147 (1973) ("the question is not whether the trial court failed to isolate and cure a particular ailing instruction; but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.").

Review in this case is important not only because the Georgia Supreme Court's refusal to designate a public high school principal a "public official" prejudiced petitioner in this case, but also because this judgment threatens to chill speech generally. Regardless of the outcome of this specific case on remand, the designation of a public high school principal as a "public official"

is necessary to assure that "breathing room" is afforded to those who comment on the operation of government so that such critics will not be deterred by the threat of suit for unintended, but inevitable, misstatements.

CONCLUSION

For the reasons stated above, amicus curiae The Atlanta Journal-Constitution respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court

of the State of Georgia in the above entitled case.

Respectfully submitted,

Jonathan D. Hart, Esq.
Counsel of Record

Peter C. Canfield, Esq.
Thomas M. Clyde, Esq.
DOW, LOHNES & ALBERTSON
One Ravinia Drive
Suite 1600
Atlanta, GA 30346
(404) 901-8800

Counsel for Amicus Curiae
The Atlanta Journal-Constitution